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ABSTRACT

Although the media has long been familiar with the tort law of libel and invasion of privacy, they may not be aware that the law of torts reaches more broadly. This paper examines legal developments in cases where actions of the media are alleged either to have caused the plaintiff to do something resulting in physical harm or financial loss, or to have caused a third person to harm the plaintiff physically. Many such actions also give a legal twist to social scientific research on the effects of mass media. This paper focuses primarily on tort actions alleging negligence, a theory of liability offering considerable flexibility. After briefly reviewing the types of situations typically leading to such actions against the media, the paper reviews tort law principles underlying negligence, considers the role of the First Amendment in negligence actions, examines how the courts have applied the principles in cases with media defendants, and assesses the implications. (Author/DF)

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Media Tort Liability for Physical Harm: Problems in Legal Duty and Cause

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The media have long been familiar with the tort law of libel and invasion of privacy. But the law of torts reaches far more broadly. As one authority has pointed out, "[p]erhaps more than any other branch of the law, the law of torts is a battleground of social theory."[1] Lawyers and legal scholars have begun to take increasing notice of theories of tort liability for negligently and intentionally inflicted emotional distress as they are applied against media defendants.[2] This paper examines developments in another niche of tort law -- actions in which media are alleged either to have caused the plaintiff to do something resulting in physical harm or financial loss, or to have caused a third person to harm the plaintiff physically.

Such actions raise difficult questions about the appropriate limits of protected expression, and they are worth noting if for no other reason than that they represent a cutting edge at the boundaries of tort liability. From a defendant's perspective, they are all the more problematic because they may involve seemingly unforeseeable plaintiffs alleging seemingly unforeseeable harm. Many such actions also give a legal twist to social scientific research on the effects of the mass media. This can be seen most recently in attempts to justify restrictions on pornography by pointing to the growing body of social scientific evidence that certain kinds of pornographic materials may be related to aggression against women.[3]

The paper focuses primarily on tort actions alleging negligence, a theory of liability offering considerable flexibility. After briefly reviewing the

types of situations typically leading to such actions against the media, the paper reviews the tort law principles underlying negligence, considers the role of the First Amendment in negligence actions, examines how the courts have applied the principles in cases with media defendants, and assesses the implications.

Types of Conduct

Suits against the media fall into three relatively discrete categories: cases in which the plaintiff has been led to do something which on its face appears to be risky; cases in which the plaintiff has been led to do something seemingly safe or innocuous but which results in injury; and cases in which the plaintiff has been harmed by a third party whose conduct allegedly has been triggered by the media.

There have been relatively few cases in which plaintiffs claim they were led to do something facially dangerous. Two cases have involved death by hanging -- DeFilippo v. National Broadcasting Company[4] and Herceg v. Hustler Magazine.[5] In DeFilippo, the parents of a 13-year-old boy alleged that their son accidentally hanged himself while trying to imitate a demonstration by a stuntman on the Tonight Show. In Herceg the family of a boy who hanged himself alleged that he did so after reading a magazine article on autoerotic asphyxiation. In another case, a plaintiff attempted to sue Popular Mechanics for injuries suffered while using fireworks advertised in the publication.[6]

Far more cases have involved injuries suffered by plaintiffs who were injured while engaging in seemingly safe activities. Such activities have included conducting a high school science experiment,[7] following a recipe,[8] trying to create a sound effect,[9] wearing a new pair of shoes,[10] having a hair

implant,[11] selling stock,[12] using a dandruff remedy,[13] riding a bus,[14] following a navigation chart,[15] and simply watching a great deal of television.[16]

Cases involving claims that a third-party has harmed the plaintiff have included such apparently intentional misconduct as shooting[17] and rape.[18] But other actions have been attempted even when the third party would seem to have intended no harm -- for example, prescribing a drug,[19] driving negligently[20] or merely purchasing stock.[21]

Basic Principles

A fundamental understanding of the concept of legal negligence is essential to understand not only the resolution of cases already brought against media defendants, but of the implications and potential of such a theory of liability. Unfortunately, negligence can be an elusive concept.

The Restatment of the Law defines negligence simply as conduct that "falls below the standard established by law for the protection of others against unreasonable risk of harm."[22] More specifically, it may be either "an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or...a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do."[23] A plaintiff wishing to collect damages for negligence must show that the defendant had a legal duty to avoid causing a particular harm, that the defendant breached that duty, that the defendant's conduct was the legal or "proximate" cause of whatever happened to the plaintiff, and that the plaintiff did in fact suffer actual loss or damage[24] But duty, proximate cause, reasonable and unreasonable are slippery, often circumstantial and interrelated concepts.

Prosser has defined duty as the "question of whether the defendant is under any obligation for the benefit of the particular plaintiff...."[25] In negligence cases, the defendant's duty is "to conform to the legal standard of reasonable conduct in the light of the apparent risk."[26] But how are potential defendants to know in advance whether they are obligated by any legal duty? The answer appears to be that there is no way to be certain. In fact, duty appears to be a function of both policy and pragmatic concerns. On one hand, the courts might impose legal duty because of a perceived social need to prevent a particular type of conduct and injury.[27] Thus, "[a]s the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution."[28] On the other hand, courts may be reluctant to find legal duty where they fear that a particular theory of liability might generate an overwhelming, unmanageable amount of litigation;[29] or they might impose a duty primarily because some kinds of defendants are better able than others to absorb financial loss.[30] Thus duty may be approached from at least two directions. It might in some situations be considered a sort of pre-existing constant -- such as the duty in most states to refrain from creating an unreasonable risk of defaming private individuals.[31] In other situations, such as those on which this paper focuses, the existence of duty might be unknown until a judge issues a decision.[32]

The matter of causation can be equally bewildering. First, there is the question whether a defendant's conduct in fact caused the consequence of which the plaintiff complains. Some courts have reduced this question to the form of the "but-for" statement: would the consequence have occurred but for the conduct of the defendant?[33] Another widely accepted approach is to ask whether the

defendant's action was a "material element and a substantial factor" in causing something to happen.[34] But factual cause is not necessarily the same as legal, or "proximate", cause -- that is, causation for which one might be held responsible legally. Two schools of thought have developed as to how far legal responsib'lity should extend. One holds that legal liability should extend to "all direct or directly traceable consequences and those indirect consequences that are foreseeable."[35] The second, and dominant, theory holds that liability should extend only to "foreseeable risks."[36] The precise detail or nature of the risk needn't be foreseeable, only its general character.[37] Of course, foreseeability is itself a difficult concept. It is far from empirically determinable whether a defendant should have foreseen the consequences that occurred. Prosser has rather cynically remarked that many courts use foreseeability analysis because "the concept of foreseeability so completely lacks all clarity and precision that it amounts to little more than a convenient formula for disposing of the case...."[38] In fact, Prosser argues that proximate cause is really inseparable from the concept of duty: "It is quite possible to state every question which arises in connection with 'proximate cause' in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?"[39]

At this point the reasoning approaches circularity. A defendant acts. As a result, someone is hurt. If the general nature of this harm should have been foreseeable to the defendant, the defendant's action was the proximate cause of the victim's injury. Therefore the defendant was under a legal duty to avoid inflicting such a foreseeable harm. In other words, the defendant owed the victim a legal duty because the defendant's actions were the proximate cause of

foreseeable harm; and the defendant's actions were the proximate cause of foreseeable harm because the defendant owed the victim a legal duty.

Duty and cause, however, do not alone determine the result of a negligence action, since it must be remembered that an act is negligent only if it creates an "unreasonable risk of harm."[40] What, then, is an "unreasonable risk of harm"? The Restatement describes unreasonableness in the following terms:

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.[41]

The Restatement lists three factors important to the determination of the utility of one's conduct: the social value the law attaches to whatever interest the conduct advances; the likelihoood that the conduct will advance that interest; and the likelihood that the interest could be adequately advanced by less dangerous conduct.[42] On the other side of the ledger, the magnitude of a risk depends on the social value the law attaches to the imperiled interest, the likelihood of harm to that interest, the extent of harm likely to be caused, and the number of people whose interests are likely to be harmed.[43]

Negligence law is built around the construct of the "reasonable person" ("reasonable man" in the language of the Restatement). That is, a defendant's conduct is always compared to that of a hypothetical reasonable person under the same circumstances. Negligence is failure to do what the hypothetical

reasonable person would have done.[44] But, at least from a defendant's perspective, we again are left with circularity: if the risk is found to have been unreasonable, at least as defined by the Restatement, it would seem to follow that only an "unreasonable person" would have failed to perceive it as such.[45]

To summarize, a finding that conduct has been negligent requires the courts subjectively to define, weight and balance tangible and intangible interests. Of course, it is precisely this subjectivity that makes tort claims for negligence so malleable. The concept seems limited only by the ability of a plaintiff's attorney to generate arguments for the recognition of new duties and for the weighting of new interests. Such arguments may not succeed, but they are the first step toward expanding legal liability.[46]

The First Amendment affects negligence tort law principles in at least two ways. First, it can establish the boundaries of legal duty across the board regarding certain types of conduct. In effect, this can simply make negligence actions impossible when defendants have done certain types of things. For example, Cox Broadcasting Corp. v. Cohn, in which the U.S. Supreme Court held the First Amendment to privilege publication of truthful information obtained from open court records, would appear to make such conduct off limits to negligence actions.[47] In other words, because of the First Amendment, journalists have no legal duty to avoid whatever harm may befall a person as a result of publication of truthful information obtained from open court records. Likewise, Brandenburg v. Ohio apparently has made negligence actions impossible where media conduct has allegedly caused violation of the law: "[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such

advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[48] In other contexts, however, it may be possible to argue that the First Amendment, as interpreted by the U.S. Supreme Court, actually sanctions actions for negligence. Such claims have emerged primarily in the aftermath of Gertz v. Robert Welch, Inc., in which the court indicated that states may allow private-figure libel plaintiffs to sue successfully if they can prove negligent conduct.[49] Thus it might be argued that if the First Amendment doesn't bar actions for libel resulting from negligence, it shouldn't bar other kinds of negligence claims either.

The second way in which the First Amendment affects the negligence tort is more situational. A court might, for example, simply hold that in the circumstances under question, the First Amendment mitigates against the conclusion that the media defendant owed a legal duty to the plaintiff. Or a court might factor First Amendment interests into the equation for determining whether or not the risk created by the defendant was "unreasonable." Obviously, the argument would be that the social value accorded to freedom of the press is high and outweighs any interest asserted by the plaintiff. If the risk wasn't unreasonable, the defendant wasn't negligent.

Finally, it must be pointed out that a plaintiff's own negligence is often relevant since "contributory negligence" may be a defense to the plaintiff's suit. Suffice it to say that the Restatement defines contributory negligence as:

> conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of

the defendant in bringing about the plaintiff's harm.[50]

The burden of proof is on the defendant, and the plaintiff's conduct is itself then subjected to the "reasonable person" standard.[51]

The Principles in Action

We can turn now to an analysis of how the principles have been applied in cases involving media defendants. Analysis becomes clearer if we consider these cases in the three categories discussed earlier: cases in which plaintiffs claim to have been led to do something facially risky; cases in which plaintiffs claim to have been led to do something seemingly safe or innocuous but out of which harm results; and cases in which plaintiffs claim to have been harmed by third parties whose conduct was triggered by the media.

Risky behavior

Thus far, the constitution has played an important role in disposing of suits arising where plaintiffs themselves have done something risky. In DeFilippo[52] and Herceg[53] the courts have applied the Brandenburg incitement test and dismissed the cases. In both cases, boys accidentally killed themselves while trying to do something described in the media -- a trick performed by a stuntman and autoerotic asphyxiation. The defendants may have been fortunate, because Brandenburg doesn't seem like a particularly good fit with the facts of the two cases. That is, Brandenburg seems most applicable in situations where harm is alleged to have resulted because the plaintiff has been encouraged to commit a crime;[54] but that was not precisely the factual context of DeFilippo and Herceg. Other grounds were, of course, available. In Herceg, for example,

the court also noted that since Hustler is a private publication, there is no legal basis for any defendant's duty with respect to the publication's content.[55] In other words, even without mention of the First Amendment, the courts might have found no legal duty. Or given the unusual nature of the incidents plus the vast size of the audience, the courts might have held the harm to have been unforeseeable.[56] Such was the response in Yuhas v. Mudge, where the court simply refused to impose any legal duty on the publisher of a magazine that had advertised the fireworks which had injured the plaintiff.[57] To impose such broad legal duty, the court said, would be impractical, unrealistic and "have a staggering adverse effect on the commercial world and our economic system."[58]

On the other hand, it might be argued that tort law principles alone may be inadequate in many such situations precisely because the risk that someone -- especially a child -- may imitate a dangerous act is clearly foreseeable. Hustler magazine had prefaced its acticle on autoerotic asphyxiation with a specific warning, "Do Not Attempt This Method."[59] The stunt hanging on the Tonight Show was preceded by a somewhat less direct warning.[60] Clearly the contributory negligence of a plaintiff would be relevant in such cases, but it too becomes problematic when the victim is a child who cannot be held to an adult standard of reasonableness.[61]

Unexpectedly harmful behavior

It is useful when considering this category of claim to consider separately those instances where a plaintiff has been harmed while acting on specific advice and those instances where a plaintiff has not been explicitly advised to do something.

Duty, cause and foreseeability would seem much more likely in cases where a media defendant has offered specific advice. In at least three cases, causes

of action have been allowed to stand in such a situation, and dicta in other cases have implied the same. In Bertrand v. Rand McNally a federal court jury awarded nearly $1 million to two girls who were seriously burned while performing a chemistry experiment in the eighth grade. They alleged in part that the textbook directions for the experiment were misleading and lacked sufficient warnings.[62] Ultimately, the publisher of the textbook paid the plaintiffs $155,000.[63] And in Hanberry v. Hearst Corp., a California appeals court reversed a demurrer for the defendant in what was technically a suit for negligent misrepresentation.[64] Suit was brought by a woman for injuries suffered when she slipped and fell while wearing shoes that had received Good Housekeeping's consumer guarantee seal. The court found that Hearst had voluntarily "placed itself in the position where public policy imposes upon it the duty to use ordinary care [so that consumers] are not unreasonably exposed to the risk of harm."[65] Since the very purpose of the guarantee seal was to induce people to purchase the product, the court concluded that it was foreseeable that some people would rely on the seal and make the purchase.[66]

Although other plaintiffs have been less successful, the reasons for their failure are not always encouraging to the media. For example, in Cardozo v. True, the plaintiff sued the author and retailer of a cookbook whose directions she was following when she was nonfatally poisoned.[67] Technically, her claim was that the book and its contents were impliedly warranted under the common law and Uniform Commercial Code. In the only reported action in the case, a Florida appeals court held that the book retailer was not liable for the material contained in the book unless the retailer knew it was dangerous.[68] But the court noted specifically that its conclusions applied only to the defendant retailer

and "do not bear on the plaintiffs' action against the [author]."[69] And in Smith v. Linn, although agreeing that the claim could not be heard under a state health care malpractice act, a court left some hope for a plaintiff seeking damages from the author and publisher of a diet book his wife was using when she died.[70] "We do not conclude, of course, that the complaint fails to state a cause of action against Dr. Linn (the author)," the court said, noting that its decision pertained only to the applicability of the malpractice act.[71]

Such decisions and dicta appear to suggest that the media may be vulnerable where they have specifically and on their own behalf advised or urged audience members to do something and when that advice does more than merely state an opinion. In other words, the risk of liability appears greatest where advice takes the form of factual instructions which turn out to be faulty or dangerously misleading, especially when the plaintiff's contributory negligence is minimal.[72]

Precisely such situations have been receiving attention recently in the context of alleged violations of securities laws. Although technically not issues of tort negligence, the underlying logic is similar and instructive. In In Re Howard Bronson & Co., the Securities and Exchange Commission issued a public report critical of the conduct of a public relations firm that had prepared and disseminated documents urging the purchase of stock in a client's firm.[73] The SEC asserted that the document contained false information and deleted material information, thus apparently violating sections of the Securities Act of 1933.[74] Public relations firms, the agency said, "must be aware of their obligation not to disseminate information concerning their clients which they know or should have reason to know is materially false or misleading...."[75] Likewise, the SEC has sought to require the publisher of

Stock Market Magazine to register as an investment adviser on grounds that the publication, which proclaimed itself a reliable investment guide but did not reveal that much of its content was provided by the companies it wrote about, was not a bona fide business or financial publication exempt from securities regulations.[76] Consequently, the SEC has argued, the publication assumed the fiduciary duties of an investment adviser.[77]

These cases at least underline how risk can increase when media defendants not only transmit advice, but actively associate themselves with it. Again, in such circumstances it seems to become easier for plaintiffs to argue that legal duty exists and that harm is foreseeable.

On the other hand, the First Amendment saved the defendant in Walt Disney Productions, Inc. v. Shannon.[78] Here an 11-year-old boy was partially blinded when he tried to imitate a sound effects trick demonstrated on the Mickey Mouse Club show. The trick involved placing a BB inside an inflated balloon, but the balloon burst and the BB struck the child's eye.[79] The Georgia Supreme Court found the Brandenburg incitement test inapplicable because, although the program allegedly invited children to try the trick, it did not incite any imminently lawless action.[80] Rather, the court applied the clear and present danger test and concluded that no clear and present danger of injury had been presented.[81] The court found it relevant that the plaintiff's injury was the only one reported out of an estimated audience of 16 million,[82] and concluded that to allow recovery would "open the Pandora's box [and] have a seriously chilling effect on the flow of protected speech through society's mediums of communication."[83]

One might argue, however, that either the First Amendment needn't have been used in the case, or that it is questionable how much protection the clear and

present danger test will really provide. Even applying common law negligence principles, it would seem reasonable to argue that the harm may not have been foreseeable to a reasonable person. On the other hand, one might ask just how different the clear and present danger standard is from a common law negligence standard. Might not clear and present danger be another way of saying "unreasonable risk"? This argument gains force if one considers that the U.S. Supreme Court's apparently favored formulation of the test is whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[84] As Prosser has pointed out in his discussion of negligence, "[a]s the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution."[85] Perhaps, then, it is not surprising that the Georgia Supreme Court specifically adopted the clear and present danger test as defined in Schenck v. United States: "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the...evils. .."[86] Allowing liability when harm is extremely unlikely appears more difficult under this formulation.

Another example of refusal to allow liabilty for what turned out to be harmful advice from the media is MacKown v. Illinois Publishing & Printing Co.[87] There the plaintiff allegedly suffered physical harm as a result of using a dandruff formula recommended by the writer of a feature story. Although the opinion is less than crystal clear, it appears the court rested its holding in part on the rationale that a feature writer cannot be held to the same standard of skill and diligence as a physician, and partially on the rationale that the newspaper had no legal duty under the circumstances.[88] A reasonable interpreta-

tion might be that, consistent with tort law principles, the risk could not have been considered unreasonable to a journalist under the circumstances, particularly since the writer was merely repeating a remedy that originated with a physician and the advice was disseminated to a mass audience on an impersonal basis. Had the writer herself concocted the remedy, the result might have been different.

Cases in which a media defendant has merely transmitted information without any recommendation or advice on its own behalf raise somewhat different questions. Plaintiffs who have acted on the basis of such information face difficult problems of legal duty and proximate cause. For example, where plaintiffs allegedly suffered physical harm from a hair implant procedure they underwent after seeing it advertised in a newspaper, the courts held that the newspaper had no legal duty to investigate each of the advertisers who purchased space.[89] And when a writer whose manuscript was lost with his baggage by a bus company sued the advertising agency whose ads had led him to take that bus, the defendant prevailed on summary judgment.[90]

Plaintiffs in non-advertising contexts have been equally unsuccessful. In Jaillet v. Cashman, the plaintiff attempted to recover damages from Dow, Jones & Co. for losses he sustained in a stock sale he undertook after the Dow Jones ticker incorrectly reported the impact of a Supreme Court decision on the taxable status of dividends.[91] The court held that the media have no general legal duty of accuracy: "[t]heoretically, a different rule might be logically adopted, but as a matter of practical expediency, such a doctrine seems absolutely necessary."[92]

Perhaps the most imaginative cause of action in this category has been Zamora v. Columbia Broadcasting System, in which the plaintiff alleged that

television violence turned him into a sociopath.[93] The plaintiff encountered difficulties on grounds of both cause and legal duty. The court noted that the plaintiff was apparently unable to point to any one incident of televised violence as the cause of his harm -- a problem of factual as well as legal cause.[94] More importantly, the court refused to impose any legal duty on the broadcaster: "To permit such a claim...presents an A Fortiori situation which would...give birth to a legal morass through which broadcasting would have difficulty finding its way."[95] Yet, although it dismissed the suit, the court noted that "[o]ne day, medical or other sciences with or without the coopets io of programmers may convince the F.C.C. or the Courts that the delicate balance of First Amendment rights should be altered to permit some additional limitations in programming."[96]

Harm by third parties

Actions growing out of situations in which plaintiffs have been harmed by third parties not only present difficult legal questions, but are beginning to involve social scientific questions as well.

According to the Restatement of the Law, an act is negligent "if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of a...third person...in such a manner as to create an unreasonable risk of harm to the other."[97] Although it is true that the actions of a third party can become a "superseding cause" that eliminates the liability of the first party, it is also accepted that

> the intervention of a force which is a normal consequence of a situation created by the actor's

> negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.[98]

But what kind of third-party misconduct can reasonably be classified as foreseeable?

In Bill v. Superior Court, a plaintiff who was shot while walking to a bus stop after seeing a violent gang movie sued the movie producer, claiming in part that it negligently failed to warn movie-goers that such a movie was likely to attract violence-prone people to the vicinity of the theatre.[99] The court ordered summary judgment for the defendant in part because of concern that such liability would have a chilling effect on expression.[100] But the court conceded that there might be circumstances in which liability could attach for failure to warn about the foreseeable reactions of third parties.[101]

Bill would seem to be a difficult plaintiff's case on grounds of both factual and legal cause. But other cases have presented tougher calls. Among them are Olivia N. v. National Broadcasting Company and Weirum v. RKO General, Inc. The former is the famous Born Innocent case in which the plaintiff alleged that her rape was the result of NBC having negligently broadcast a movie in which a victim was raped in the same fashion.[102] Weirum involved allegations that a radio station's cash prize contest was responsible for a fatal automobile accident which occurred as a driver forced another car off the road while rushing to win the prize.[103] The plaintiff in Olivia N. was unsuccessful; the plaintiff in Weirum won a $300,000 award and it was affirmed on appeal.

The plaintiff in Olivia N. attempted to show the necessary cause by offering to demonstrate that NBC knew about research on the effects of violence

on children and should have known that some persons might well imitate the rape scene.[104] But the court required the plaintiff to meet the Brandenburg incitement standard -- something the plaintiff was unable to do.[105] The court was apparently worried about the broadened liability that could result from a decision favorable to the plaintiff.[106] The court in Weirum took virtually the opposite position. The court first concluded that the media defendant owed the plaintiff a legal duty under the circumstances because the risk of harm was so foreseeable.[107] Using standard tort law analysis, the court then reasoned that the risk was unreasonable because neither entertainment nor its commercial rewards could justify the grave risk created.[108] And the court specifically rejected the First Amendment as a defense: "The First Amendment does not sanction the infliction of physical injury merely because achieved by word rather than act."[109]

Taken together, Olivia N. and Weirum may clearly illustrate the shortcomings of the constitutional incitement test. The facts in Brandenburg are simply too different from those in cases like these to make the precedent consistently useful.[110] To apply an incitement test is almost the same as creating an absolute bar to liability. If, as appears to be the case in Weirum, an injustice would be done by exonerating the media, it is relatively easy to distinguish Brandenburg. Conversely, Brandenburg can provide an excuse for a court not really to come to grips with an otherwise difficult case.

Mounting social scientific evidence on the impact of the mass media -- particularly the impact of violent content -- must sooner or later put increasing pressure on the courts. Almost every legal commentator to date has called for at least limited media liability for physical harm caused by third

parties.[111] And there is now an impressive array of social scientific evidence linking media content with real-life murder and suicide,[112] aggression,[113] and males' attitudinal dispositions toward sexual assault.[114] Such evidence has not only been used already in an attempt legislatively to create a cause of action where third parties, triggered by media content, physically harm others,[115] but must certainly bear directly on the common law negligence requirements of causation and foreseeability. As Prosser has aptly pointed out, "[a]s scientific knowledge advances, and more and more effective tests become available, what was excusable ignorance yesterday becomes negligent ignorance today."[116]

Implications

The concept and confines of legal duty may be central to the future of actions against the media for physical harm -- particularly to the degree that empirical research, and often mere common sense, make problems of factual causation less formidable for plaintiffs.

Ironically, the media may be unintentionally assisting in their own legal demise by failing to recognize or underestimating the potential overlap between moral and legal duty in the context of media ethics. Ethical standards, if written in terms too absolute and specific, could be interpreted as a voluntary assumption of legal duty by the media, or at least as standards against which "reasonable" journalistic conduct may be measured.

Already there have been attempts -- some of them successful -- in a variety of contexts to transform moral ethics into legal standards. There has been some attempt to make voluntary fair trial-free press guidelines legally binding,[117] and one court has succeeded in requiring journalists to promise to honor such guidelines as a condition of courtroom access.[118] In the context of labor rela-

tions, the right of unions to bargain over ethics code provisions carrying penalties has been upheld.[119] In the context of securities regulation, the S.E.C. has asserted that a journalist may be held legally responsible for violation of securities law in part on the basis of violation of his newspaper's policy on confidentiality.[120] And already in at least one suit for negligent infliction of emotional distress, a state court has specifically noted that violation of a newspaper's unwritten policy of not naming sexual assault victims could be construed as evidence of negligence.[121] One newspaper editor has lamented that "lawyers are using against the press the media's own efforts to police themselves and to assure fairness and accuracy."[122] The same editor noted that an attorney suing his newspaper had quoted from critical columns by the paper's ombudsman in an effort to show that the paper hadn't lived up to its own standards.[123]

In fact, many ethics code provisions seem ripe for just such manipulation. For example, the Statement of Principles of the American Society of Newspaper Editors begins by declaring that the "First Amendment...places on newspaper people a particular responsibility," and states that journalists should "stand accountable to the public for the fairness and accuracy of their news reports."[124] The Code of Ethics of the Society of Professional Journalists, Sigma Delta Chi asserts that mass media have responsibilities which "carry obligations that require journalists to perform with intelligence, objectivity, accuracy, and fairness,"[125] and specifies that there is "no excuse for inaccuracies," that it is the "duty" of the media to correct errors, and that "journalists should be accountable to the public...."[126] The Television Code of the National Association of Broadcasters states that the "presentation of techniques of crime in such detail as to be instructional or invite imitation shall

be avoided."[127] And the Code of Professional Standards for the Practice of Public Relations of the Public Relations Society of America specifies that "[a] member shall not intentionally communicate false or misleading information and is obligated to use care to avoid communication of false or misleading information."[128]

It would be wrong to be alarmist about the risk. It would be perverse if in the process of trying to become more responsible, the media had to risk increased legal liability. Certainly, there is no compelling reason to rush to repeal codes of media ethics or to refrain from self-criticism. But in writing and talking ethics, the media would be wise consistently to emphasize what may not be sufficiently obvious -- that espousal of ethical standards is not forfeiture of legal rights, that moral ideals are not inherently legal imperatives.

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FOOTNOTES

1. Prosser & Keeton on the Law of Torts 15 (W. Keeton, ed.; 5th ed. 1984) [hereinafter cited as "Prosser"].

2. See, e.g., Drechsel, Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media, 89 Dick.L.Rev. 339 (1985); Linder, When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting from Publication of Accurate Information, 52 UMKC L. Rev. 421 (1984); Mead, Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution, 23 Washburn L.J. 24 (1983); Stevens, The 'Tort of Outrage': A New Legal Problem for the Press, Newspaper Research J., Spring 1984, at 27; Stevens, Media Liability for Emotional Distress, 54 Journalism Q. 157 (1977).

3. See, e.g., American Booksellers Ass'n v. Hudnut, 11 Media L. Rep. (BNA) 1105 (S.D. Ind. 1984).

4. 446 A.2d 1036 (Sup. Ct. R.I. 1982).

5. 9 Media L. Rep. (BNA) 1959 (S.D. Tex. 1983).

6. Yuhas v. Mudge, 129 N.J. Super. 207, 322 A.2d 824 (App. Div. 1974).

7. Bertrand v. Rand McNally, Nat'l L.J., Sept. 22, 1980, at 3, col. 1.

8. Cardozo v. True, 342 So.2d 1053 (Ct. App. Fla. 1977).

9. Walt Disney Productions, Inc. v. Shannon, 276 S.E.2d 580 (Sup. Ct. Ga. 1981).

10. Hanberry v. Hearst Corp., 276 Cal.App.2d 680, 81 Cal.Rptr. 519 (1969).

11. Hernandez v. Underwood, 7 Media L. Rep. (BNA) 1535 (Sup. Ct. N.Y. 1981); Suarez v. Underwood, 103 Misc.2d 445, 426 N.Y.S.2d 208 (1980), aff'd, 84 A.D.2d 787, 449 N.Y.S.2d 438 (1981).

12. Jaillet v. Cashman, 115 Misc. 383, 189 N.Y.S. 743 (1921), aff'd, 202 A.D. 805, 194 N.Y.S. 947 (1922), aff'd, 235 N.Y. 511, 139 N.E. 714 (1923).

13. MacKown v. Illinois Pub. & Print Co., 289 Ill.App. 59, 6 N.E.2d 526 (1937).

14. Paine-Henderson v. Eastern Greyhound Lines, Inc., 320 F. Supp. 1138 (D.S.C. 1970).

15. Times Mirror Co. v. Sisk, 122 Ariz. 174, 593 P.2d 924 (1978).

16. Zamora v. Columbia Broadcasting System, 480 F.Supp. 199 (S.D. Fla. 1979).

17. Bill v. Superior Court, 8 Media L. Rep. (BNA) 2622 (Ct. App. Cal. 1982).

18. Olivia N. v. National Broadcasting Co., 126 Cal.App.3d 488, 178 Cal.Rptr. 888 (1981).

19. Libertelli v. Hoffman-LaRoche, 7 Media L. Rep. (BNA) 1734 (S.D.N.Y. 1981).

20. Weirum v. RKO General, Inc., 15 Cal.3d 40, 123 Cal.Rptr. 468, 539 P.2d 36 (1975).

21. Zweig v. Hearst Corp., 521 F.2d 1129 (9th Cir. 1975), cert. denied, 423 U.S. 1025 (1975). See also, Zweig v. Hearst Corp., 407 F.Supp. 763 (C.D. Cal. 1976), rev'd, 594 F.2d 1261 (9th Cir. 1979).

22. Restatement (Second) of Torts §282 (1965).

23. Id. at §284.

24. Prosser, supra note 1, at 164-65.

25. Id. at 356.

26. Id.

27. Id. at 359.

28. Id. at 171.

29. Id. at 359.

30. Id. at 287.

31. See e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

32. See e.g., Green, The Duty Problem in Negligence Cases, 28 Colum. L. Rev. 1014 (1928).

33. Prosser, supra note 1, at 266.

34. Id. at 267.

35. Prosser, supra note 1, at 273.

36. Id.

37. Id. at 299.

38. Id. at 297.

39. Id. at 274.

40. Restatement, supra note 22.

41. Id. §291.

42. Id. §292.

43. Id. §293.

44. Id. §283. See generally, Prosser, supra note 1, at 173-208.

45. Restatement, supra note 22, §283 comment e, speaks to this point: "The judgment which is necessary to decide whether the risk so realized is unreasonable, is that which is necessary to determine whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it. This requires not only that the actor give to the respective interests concerned the value which the law attaches to them, but also that he give an impartial consideration to the harm likely to be done the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to those of others."

46. In addition to being a tort action in and of itself, as it is in the majority of cases under consideration in this paper, negligence can be incorporated as part of the fault requirement of other torts, such as libel.

47. 420 U.S. 469 (1975). Cox involved an invasion of privacy claim by the surviving family of a rape-murder victim whose name was obtained from open court records and publicized.

48. 395 U.S. 444, 447 (1969). In Brandenburg, the court struck down a state criminal syndicalism statute because it permitted prosecutions even when there was no incitement.

49. 418 U.S. 323 (1974).

50. Restatement, supra note 22, §463.

51. Id., §464.

52. 446 A.2d 1036 (Sup. Ct. R.I. 1982).

53. 9 Media L. Rep. (BNA) 1959 (S.D. Tex. 1983).

54. See note 48 supra and accompanying text.

55. 9 Media L. Rep. at 1960.

56. For an argument that tort law principles are more than adequate to resolve such cases, see Zuckman, There Is Tort Liability for Negligent Programming, Com. Law., Winter 1983, at 1. See also, Note, Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations, 93 Yale L.J. 744 (1984), and Pearlman & Marks, Broadcast Negligence: Television's Responsibility for Programming, Trial, August 1980, at 40. Contra, Abrams, Negligent Programming? Some First Amendment Ramifications, Com. Law., Winter 1983, at 1.

57. 129 N.J. Super. 207 (App. Div. 1974).

58. Id. at 209-10.

59. 9 Media L. Rep. at 1962 n. 3.

60. 446 A.2d at 1037.

61. Restatement, supra note 22, §464 asserts that the "standard of conduct to which a child must conform for his own protection is that of a reasonable person of like age, intelligence, and experience under like circumstances."

62. Jury Blames Text for School Fire, Nat'l L.J., Sept. 22, 1980, at 3, col. 1.

63. Rand McNally to Pay Damages in School Textbook Mishap, Publisher's Weekly, Sept. 26, 1980, at 42.

64. 276 Cal.App.2d 680, 81 Cal. Rptr. 519 1969).

65. 276 Cal.App.2d at 684, 81 Cal. Rptr. at 522.

66. Id. See also De La Bere v. Pearson, Ltd., 1 K.B. 483 (1907), appeal dismissed, 1 K.B. 280 (1908), in which an award was upheld for a plaintiff who, after being invited to solicit a newspaper's recommendation for a good stock broker, lost money when the recommended broker turned out not to be a member of the exchange and misappropriated plaintiff's money. Technically, however, the courts interpreted the action as one for breach of contract.

67. 342 So.2d 1053 (Ct. App. Fla. 1977).

68. Id. at 1057.

69. Id. at 1055.

70. 414 A.2d 1106 (Commw. Ct. Pa. 1980).

71. Id. at 1108.

72. See Stevens, Newspaper Liabilty for Harmful Advice, Newspaper Research J., July 1982, at 46. Although Stevens concludes that the "law may be moving in the direction of allowing liability," id. at 51, he also concludes that there is little danger of damage recovery with the possible exception of situations in which serious physical harm results or where there is some special personal contact between plaintiff and defendant.

73. 16 Sec. Reg. & L. Rep. (BNA) 1207 (July 20, 1984).

74. Id. at 1208. Bronson, however, was a public report only, not an adjudication of fact or issue.

75. Id. at 1207.

76. SEC v. Wall Street Publishing Institute, 10 Media L. Rep. (BNA) 2145 (D.C.D.C. 1984).

77. Id. The SEC has relied heavily on SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963), in which the Supreme Court agreed that the agency could compel a registered investment adviser to disclose to his clients that he purchased shares of securities for himself before recommending them to others, and then sold them when the market rose. The adviser published two services reaching several thousand readers.

78. 276 S.E.2d 580, 247 Ga. 402 (1981).

79. Id.

80. 276 S.E.2d at 582, n. 2.

81. Id. at 583.

82. Id. at 583 n. 4.

83. Id. at 583. For analysis of the case, see Note, Broadcast Negligence and the First Amendment: Even Mickey Mouse Has Rights, 33 Mercer L. Rev. 423 (1981).

84. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976).

85. Prosser, supra note 1, at 171.

86. 249 U.S. 47, 52 (1919).

87. 6 N.E.2d 526.

88. Id. at 529-30.

89. Suarez v. Underwood, 103 Misc.2d 445, 426 N.Y.S.2d 208 (1980), aff'd, 84 A.D.2d 787, 449 N.Y.S.2d 438 (1981); Hernandez v. Underwood, 7 Media L. Rep. (BNA) 1535 (Sup. Ct. N.Y. 1981).

90. Paine-Henderson v. Eastern Greyhound Lines, Inc., 320 F.Supp. 1138 (D.S.C. 1970). The plaintiff claimed that as a result of the advertising he believed all of the buses to be through-buses, and when the bus he took was not a through-bus, his baggage was lost when it was transferred. The court held that the advertising was simply not subject to such an interpretation.

91. 189 N.Y.S. 743 (Sup. Ct. 1921), aff'd, 194 N.Y.S. 947 (1922), aff'd, 235 N.Y. 511 (1923).

92. 189 N.Y.S. at 744.

93. 480 F.Supp. 199 (S.D. Fla. 1979).

94. Id.

95. Id. at 206.

96. Id. at 206-7.

97. Restatement, supra note 22, §303.

98. Id., §443.

99. 8 Media L. Rep. (BNA) 2622 (Ct. App. Cal. 1982).

100. Id. at 2625.

101. Id. at 2626.

102. 126 Cal.App.3d 488, 178 Cal. Rptr. 888 (1981).

103. 15 Cal.3d 40, 123 Cal. Rptr, 468, 539 P.2d 36 (1975).

104. 126 Cal.App.3d at 492, 178 Cal. Rptr. at 891.

105. 126 Cal.App.3d at 495, 178 Cal. Rptr. at 893.

106. Id.

107. 15 Cal.3d at 39.

108. Id. at 40.

109. Id.

110. See note 48 supra.

111. See, Linz, Turner, Hesse & Penrod, Bases of Liability for Injuries Produced by Media Portrayals of Violent Pornography, in Pornography and Sexual Aggression 277 (N. Malamuth & E. Donnerstein eds. 1984); Note, Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis, 52 S. Cal. L. Rev. 529 (1979); Note, The Regulation of Televised Violence, 26 Stan. L. Rev. 1291 (1974); Note, supra note 56; Note, supra note 83; Pearlman & Marks, supra note 56; Spak, Predictable Harm: Should the Media Be Liable? 42 Ohio St. L. J. 671 (1981); Urwin, Tort Liability of Broadcasters for Audience Acts of Imitative Violence, 19 Pub. Ent. Advert. & Allied Fields L. Q. 315 (1981); Violence on Television, 6 Colum. J.L. & Soc. Probs. 303 (1970).

112. See, e.g., Phillips, The Behavioral Impact of Violence in the Mass Media: A Review of the Evidence from Laboratory and Nonlaboratory Investigations, 66 Soc. & Soc. Research 387 (1982); Phillips, Natural Experiments on the Effects of Mass Media Violence on Fatal Aggression: Strengths and Weaknesses of a New Approach, 19 Advances in Experimental Soc. Psychology (in press).

113. The literature is vast. Among the basics are L. Berkowitz, Aggression: A Social Psychological Analysis (1962), and Television and Social Behavior (Report to the Surgeon General's Scientific Advisory Committee on Television and Social Behavior 1972).

114. See, e.g., Malamuth & Donnerstein, The Effects of Aggressive-Pornographic Mass Media Stimuli, 15 Advances in Experimental Soc. Psychology 103 (1982).

115. See American Booksellers Ass'n v. Hudnut, 11 Media L. Rep. (BNA) 1105 S.D. Ind. 1984), striking down an Indianapolis ordinance which in part provided a cause of action for damages where the "assault, physical attack, or injury of any woman, man or child, or transsexual...is directly caused by specific pornography." After acknowledging the social scientific evidence regarding the impact of pornography used by the government to justify the law, the court concluded that it "must and does declare the Ordinance invalid without being bound by the legislative findings because 'pornography', as defined and regulated in the Ordinance, is constitutionally protected speech." Id. at 1121.

116. Prosser, supra note 1, at 185.

117. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (order prohibiting media from publishing information obtained during open court proceedings unconstitutional). Before the case was decided by the full court, however, Justice Blackmun, in a chambers opinion, concluded that state courts could legally impose provisions of voluntary guidelines on the media so long as they were pertinent to the case at hand and were adequately specific. 423 U.S. 1327, 1331 (1975). The guidelines in question in Nebraska Press, however, were too vague to pass muster, Blackmun concluded. Id. at 1330-31. The full court never directly had to confront the guidelines question because the Nebraska Supreme Court held the trial court's legal enforcement of the guidelines to be unconstitutional: "The guidelines were not intended to be contractual and cannot be enforced as if they are." State v. Simants, 236 N.W.2d 794, 805 (Sup. Ct. Neb. 1975). See also, State v. Allen, 73 N.J. 132, 373 A.2d 377 (1977), in which the New Jersey Supreme Court, in vacating an order prohibiting publication of certain evidence and testimony outside the presence of a jury, rejected mandatory imposition of guidelines as an appropriate method for control of prejudicial publicity. "[T]he Statement of Principles has no binding effect," the court said. "Its compulsion is moral and not legal...." 73 N.J. at 141, 373 A.2d at 381.

118. Federated Publications Inc. v. Swedberg, 96 Wash.2d 13, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982).

119. Capital Times Co. and Newspaper Guild of Madison, Local 64, 223 N.L.R.B. 651 (1976); Newspaper Guild of Greater Philadelphia, Local 10 v. N.L.R.B., 636 F.2d 550 (D.C. Cir. 1980).

120. S.E.C. v. Brant, 84 Civ. 3470 (CBM) (S.D.N.Y., filed May 14, 1984). See also, Address by John M. Fedders, American University School of Communication and National Center for Business and Economic Communication seminar (Oct. 22, 1984), republished in 2 Communications Law 1984 887.

121. Hyde v. City of Columbia, 637 S.W.2d 251, 269 n. 25 (Ct. App. Mo. 1982), cert. denied, 103 S.Ct. 1233 (1983).

122. Cunningham, Who Said What About Whom? Quill, March 1985, at 7, 8.

123. Id.

124. Republished in W. Rivers, W. Schramm & C. Christians, Responsibility in Mass Communication 289 (3rd ed. 1980).

125. Id. at 291.

126. Id. at 293.

127. Id. at 325.

128. Id. at 342.

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